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Contract Resurrected! Contract Formation: Common Law – UCC – CISG

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Contract Resurrected! Contract Formation: Common Law ~ UCC ~ CISG

Sarah Howard Jenkins[†]

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I. Introduction

Following the promulgation of the Uniform Commercial Code

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("UCC")¹ and the Restatement (Second) of Contracts ("Restatement")² with its broad perspective on promissory estoppel, prescient sages of contract law and theory proclaimed, first, the irrelevance³ of contract as a theoretical basis for an obligation and then its death.⁴ Friedman and Macaulay prophesied that standardized business procedures, social relationships, and shared norms and expectations nullified the necessity for contract law. Rather than establishing norms for commercial behavior, they asserted contract was an expensive tool for enforcement and sanctioning misbehavior.

And why is contract doctrine not central to business exchanges? Briefly put, *private, between-the-parties sanctions* usually exist, work, and do not involve the costs of using contract law either in litigation or as a ploy in negotiations. To begin with, business relationships rarely generate the kinds of problems considered by academic contract law. There is a constant pressure to standardize business and reduce recurring patterns to a routine. Routine and form create widely shared expectations so that people can understand who is to do what, quite apart from the words of a formal contract.⁵

For Friedman and Macaulay, external control over consensual agreements through the application of contract law rules and principles was inconsistent with and derogated from self-regulation based on "community" expectations which, in their view, more effectively control commercial contract behavior than the law of contracts.⁶ But, time has established that Friedman and

¹ Uniform Commercial Code (1997) (Promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, now the Uniform Law Commission, in 1952.) [hereinafter U.C.C].

² RESTATEMENT (SECOND) OF CONTRACTS (1981) (Promulgated by the American Law Institute, the Restatement (Second) of the Law of Contracts is a restating by the American Law Institute of the perceived better rule of law.).

³ Lawrence M. Friedman & Stewart Macaulay, *Contract Law and Contract Teaching: Past, Present, and Future*, 1967 WIS. L. REV. 805, 819-20 (1967) [hereinafter Friedman & Macaulay].

⁴ GRANT GILMORE, *THE DEATH OF CONTRACT* 88 (Ronald K. L. Collins, 2d ed. 1974).

⁵ Friedman & Macaulay, *supra* note 3, at 815.

⁶ *See id.* at 817,

Macaulay were wrong. Although parties agree to arbitrate their disputes, contract law and prevailing usages and custom or modern *Lex Mercatoria* rather than social norms and unexpressed expectations govern the resolution of their disputes.⁷

Seven years after Friedman and Macaulay's edict, Grant Gilmore, a dean of contract law and theory, decried the doctrine of Consideration, the then prevailing doctrine for distinguishing enforceable and unenforceable promises. With the expansion and development of the theoretical basis for promissory estoppel⁸ and promissory restitution⁹ in the Restatement, Gilmore asserted that contract would be absorbed into torts, as he stated: "We are fast approaching the point where, to prevent unjust enrichment, *any benefit* received by a defendant must be paid for unless it was clearly meant as a gift; where *any detriment* reasonably incurred by a plaintiff in reliance on a defendant's assurances must be recompensed."¹⁰ Gilmore envisioned the convergence of substantive law so that no distinction between obligations in contract and tort existed.¹¹ Gilmore was correct regarding the dethroning of Consideration as the sole test for determining enforceability of promises but wrong on his prediction that contract would be absorbed into torts. On the contrary, recovery based on promissory estoppel has not proven to be the gold mine of expanded liability for promises that some expected.¹² In their research on promissory estoppel, Professors Schwartz and Scott determined, from a random sampling of 108 cases, that thirty cases involved claims based on reliance occurring before an agreement on the terms. In eighty-seven percent of these thirty cases, courts denied the claims asserted whether based on promissory estoppel

⁷ See, e.g., UNIDROIT Principles of International Contracts (2010); ICC, Incoterms 2010 (2010); ICC, Uniform Custom and Practice for Documentary Credits Revised 2007 (2006). See also Case No. 11/2002; Court: International Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation; <http://www.unilex.info/case.cfm?id=857> (contract terms required all disputes to be resolved in accordance with the general principles of the *lex mercatoria*; the tribunal applied the UNIDROIT Principles of International Contracts) (November 5, 2002)

⁸ RESTATEMENT (SECOND) OF CONTRACTS § 90.

⁹ *Id.* at §§ 82-86.

¹⁰ GILMORE, *supra* note 4, at 88.

¹¹ *Id.*

¹² *Id.*

or quasi-contract.¹³

Gilmore also erred in his augury that the demise of Consideration was also the death of contract. Currently, 83 nations¹⁴ are contracting states to the United Nations Convention on Contracts for the International Sale of Goods ("CISG"),¹⁵ a convention defining the process for contract creation and delineating the obligations of the parties. Consideration is not mentioned and is not required;¹⁶ agreements between the parties need not be tested for either Consideration or causa.¹⁷ The CISG as a new promulgation reaffirms the relevance and vitality of contract but rejects, in part, attempts in the UCC to expand contract liability, as illustrated by the operation of UCC § 2-207.¹⁸ In the UCC, an unconditional acceptance stating additional or different terms always results in contract formation. The issue then becomes whether the additional or different term becomes a term of the contract, thus expanding the opportunity for contract liability.¹⁹ The CISG uses a different theoretical foundation for

¹³ Schwartz & Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661, 671-72 (2007) ("Thirty cases raised the issue of reliance in the absence of any agreement by the parties regarding terms. These cases thus posed the question whether the plaintiff could recover reliance costs even though the parties had not reached any agreement. The courts did not find liability, whether based on promissory estoppel or *quantum meruit*—in twenty-six, or approximately 87%, of the thirty preliminary negotiation cases.").

¹⁴ For a list of contracting states, nations who are parties to the treaty, visit www.uncitral.org.

¹⁵ United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 (The United Nations Convention on Contracts for the International Sale of Goods came into force for contracts involving parties with businesses in the United States on January 1, 1988.) [hereinafter "CISG"].

¹⁶ Gyula Erösi, *Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods: The Relationship Between Rules On Sales And On Formation of Contracts of Sale*, 27 AM. J. COMP. L. 311, 316 (1989) (describing the failure of both the Working Group and the Conference in raising the necessity of Consideration for formation of contracts and the exclusion of the need for Consideration for modification and abrogation of contracts justifying extension by analogy of the exclusion of Consideration for formation).

¹⁷ See generally Ernest G. Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L.J. 621 (1919) (discussing different contract laws in different jurisdictions regarding causa and consideration).

¹⁸ U.C.C. § 2-207 (1997); cf. CISG, *supra* note 15, art. 19.

¹⁹ Gilmore viewed Holmes' insistence on Consideration as an attempt to narrow the possibility of contract liability. See GILMORE, *supra* note 4, at 88.

unconditional acceptances that state additional or different terms. The CISG treats those purported acceptances as a rejection and, thereby, a counteroffer.²⁰ Consequently, the potential for contract liability under the CISG is not as broad as that under the UCC.

The CISG is being embraced by nations as part of the economic and technological revolution that has birthed global interdependence among nations. This article addresses from a comparative perspective the requirements, objectives, and policies that govern contract formation of transactions in goods subject to the UCC and to the CISG.

II. Contract Formation – The Process: Common Law

Contrary to Gilmore's prediction, first year law students attending United States domestic law schools continue to invest numerous hours studying contract law, seeking to determine whether a communication is an offer,²¹ a manifestation of assent that a reasonable person in the recipient's position would believe invites his or her assent and, if the assent is given, will conclude a contract.²² Communications such as "First Come, First Served"²³ or "We offer Michigan fine salt in full car load lots of 80 to 95 barrels delivered to your city"²⁴ are assayed. Students use guidelines such as the presence of language of commitment or undertaking,²⁵ the definiteness of the terms,²⁶ and the number of

²⁰ See CISG, *supra* note 15, art. 19(1).

²¹ See *generally* RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981) (stating the definition of an offer).

²² *Id.* §§ 1, 24.

²³ *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 251 Minn. 188, 86 N.W.2d 689 (1957).

²⁴ *Moulton v. Kershaw*, 59 Wis. 316, 18 N.W. 172 (1884).

²⁵ RESTATEMENT (SECOND) OF CONTRACTS § 26 cmt. b (1981); see *Bourke v. Kazaras*, 746 A.2d 642 (Pa. Super. Ct. 2000) (holding that an advertisement to which client responded was not an offer but merely an invitation to call bar association's lawyer referral service for the purpose of entering into negotiations which might subsequently result in offer and acceptance); see *generally* *Interstate Indus., Inc. v. Barclay Indus., Inc.*, 540 F.2d 868 (7th Cir. 1976) (holding that where a letter sent by seller to buyer advised buyer of availability of goods, specifically referred to its contents as a "price quotation," contained no language which indicated that offer was being made, and failed to mention the quantity, time of delivery, or payment terms, such letter did not constitute an "offer").

²⁶ See *generally* *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 251 Minn.

parties to whom the communication is addressed²⁷ to resolve the question of whether the first step in the process of contract formation, the making of an offer, has been achieved.²⁸ This common law approach for determining whether an offer has been made supplements Article 2 of the Uniform Commercial Code unless displaced by the provisions of Article 2, including the underlying purposes and policies of the Article.²⁹ Although the UCC abrogates the need for Consideration for some option contracts³⁰ and for modification or discharge of contracts that occur in good faith,³¹ the doctrine is not completely displaced and, therefore, remains applicable for the enforcement of a contract for the sale of goods.

Given the continued relevancy of the common law, must common law rules or similar rigid formalities be applied to cross border transactions for goods between parties with their places of business in nations that are signatories to the CISG? What law governs the determination of the existence of a contract, if the parties have opted-out of the CISG, or remain subject to its provisions?

III. Contract Formation – The Process: UCC & the CISG

Despite the rigid formalism of the common law,³² the UCC

188, 86 N.W.2d 689 (1957) (holding that where offer in advertisement addressed to the general public is clear, definite, explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract); *see generally* *Zanakis-Pico v. Cutter Dodge, Inc.*, 98 Haw. 309, 47 P.3d 1222 (2002) (holding that advertisements are generally not binding contractual offers, unless they invite acceptance without further negotiations in clear, definite, express, and unconditional language).

²⁷ *Maryland Supreme Corp. v. Blake Co.*, 279 Md. 531, 539, 369 A.2d 1017, 1032 (1977).

²⁸ *See generally* *Interstate Indus., Inc. v. Barclay Indus., Inc.*, 540 F.2d 868 (7th Cir. 1976) (holding that an offer must be sufficiently certain to enable courts to understand what is asked for and what consideration is sought for the promise).

²⁹ U.C.C. § 1-103(b) (1997). Article 2 of the Uniform Commercial Code has been codified in all but one state, Louisiana. *Why States Should Adopt UCC Article 2A*, UNIFORM LAW COMMISSION (2014), <http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UCC%20Article%202A>.

³⁰ *See id.* § 2-205.

³¹ *See id.* § 2-209(1).

³² *See* Curtis Bridgeman, *Why Contracts Scholars Should Read Legal Philosophy: Positivism, Formalism, and the Specification of Rules in Contract Law*, 29 CARDOZO L.

proclaims in section 2-204 that a contract may be formed in any manner sufficient to show the existence of a contract, even though the moment of its making is indeterminable and one or more of its essential terms are omitted.³³ Section 2-204 provides the first indication that the formalities of the common law are minimized by the UCC. It is evidence of a strong public policy favoring the recognition of a contract and the enlargement of contract liability.³⁴ If both parties intend to be bound and a reasonably certain basis for a remedy is present, a contract will not fail for indefiniteness.³⁵ If the agreement is otherwise enforceable, the Statute of Frauds is satisfied and illegality and other public policy limitations are inapplicable, this formless agreement will be enforced. The court will use default terms to supplement the agreement of the parties.³⁶ However, an assessment of a party's intention requires the application of the common law principles of mutual assent.³⁷ Therefore, the renounced formalism remains

REV. 1443, 1443-44 (2008).

³³ U.C.C. § 2-204 ("Formation in General. (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract. (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined. (3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."); *see, e.g.*, Maryland Supreme Corp. v. Blake Co., 279 Md. 531, 369 A.2d 1017 (1977) (holding that the verbal acceptance by subcontractor of general contractor's offer was reasonable in the circumstances, that subcontractor did so accept it, and that the conduct of the parties, particularly that of general contractor in delivering concrete and that of subcontractor in accepting and paying for it, recognized the existence of a contract).

³⁴ *Cf.* GILMORE, *supra* note 4 (describing Holmes' requirement of Consideration as reflecting a narrowing of liability for breach of one's promises).

³⁵ U.C.C. § 2-204(3).

³⁶ Natchez Electric and Supply Co., Inc. v. Johnson, 968 So.2d 358 (Miss. 2007) (holding that employer's acceptance of parts or signing of delivery slips was sufficient for finding contractual intent); *see* Continental-Wirt Electronics Corp. v. Sprague Elec. Co., 329 F. Supp. 959, 964 (E.D. Pa. 1971) (finding that parties knew which piece of equipment was involved in the transaction, its selling price, and the basics of what the price included, and no more was necessary for the formation of a contract). *See also* U.C.C. § 2-311(1).

³⁷ *See generally* Winforge, Inc. v. Coachmen Indus., Inc., 691 F.3d 856 (7th Cir. 2012) (holding that since mutual assent was lacking, no enforceable contract was created); Maryland Supreme Corp. v. Blake Co., 279 Md. 531, 369 A.2d 1017 (1977); Swanson v. Holmquist, 13 Wash. App. 939, 539 P.2d 104 (1975). *See also* U.C.C. § 1-

applicable.

The common law determination of intent to be bound is an objective one. The nature of the objective inquiry under domestic law asks: would a reasonable person in the position of the recipient of the manifestation of assent – the words, the conduct, or a failure to act – believe that a commitment is being made.³⁸ A party must intend the action taken and know or have reason to know that the other may infer an intention to be bound by the words, conduct, or failure to act.³⁹ Subject to rules of avoidance⁴⁰ for mistake, fraud, duress, or the like, actual mental assent by the offeror is not a requirement.⁴¹

Unlike the broad pronouncement of Section 2-204 of the UCC, the CISG states a fact-intensive principle for the first stage of

103(b) (1997) ("Applicability of Supplemental Principles of Law: Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.").

³⁸ RESTATEMENT (SECOND) OF CONTRACTS § 2, cmt. b (1981); *see id.* § 19 ("Conduct as Manifestation of Assent: (1) The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act. (2) The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents. (3) The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause."); *see also id.* § 4 ("How a Promise May Be Made: A promise may be stated in words either oral or written, or may be *inferred* wholly or partly from conduct.") (emphasis added).

³⁹ *Id.* § 19(2) ("The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.").

⁴⁰ *See id.* § 19 cmt. b (explaining that while a party must manifest assent, change in position is not necessary, and change in position is relevant to the existence of a power of avoidance). The reference to avoidance, the unilateral right to rescind a contract because of the status of the party seeking to rescind, or the fault or misconduct by the other party to the agreement in U.S. domestic law is distinguishable from avoidance recognized by the CISG, the right to cancel a contract because of a fundamental breach by the other party. *See generally* CISG arts. 49 & 64.

⁴¹ *Id.* § 19(3) ("The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause."); *see also id.* at cmt. b (discussing what information is needed for a person to have reason to know some fact).

contract formation.⁴² A proposal is an *offer* if it is sufficiently definite, indicates the goods, expressly or implicitly fixes or makes provision for determining the quantity and the price, and indicates the intention of the offeror to be bound.⁴³ Subject to one exception, when the parties may have formed a contract without agreeing on the price,⁴⁴ intent plus the material terms of subject matter, quantity, and price are required before a proposal is deemed an offer satisfying the foundational step in contract formation.⁴⁵ These terms may arise from communications

⁴² CISG, *supra* note 15, art. 14 (“(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price. (2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.”).

⁴³ See *Easom Automation Sys., Inc. v. Thyssenkrupp Fabco, Corp.*, No. 06-14553, 2007 WL 2875256 at *3 (finding that the seller’s quote, being sufficiently precise, might be considered as an offer under the CISG); *Cherry Stix Ltd. v. President of the Can. Borders Servs. Agency*, [2005] AP-2004-009 (Can.) (holding that since an offer needs to be sufficiently definite and to show the offeror’s intention to be bound in case of acceptance, acceptance becomes effective when it reaches the offeror); *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.*, No. 98 CIV.961 RWS, 99 CIV.3687 RWS, 2002 WL 1933881 at *3-4 (holding that the proposal was sufficiently definite as the “alleged contract clearly identifies the goods at issue, clathrate.”).

⁴⁴ See CISG, *supra* note 15, art. 55 (discussing what happens when parties form a contract without expressly or implicitly fixing or making a provision to determine the price).

⁴⁵ See *Oberlandesgericht Frankfurt [OLG] [Provincial Court of Appeal]* Aug. 30, 2000, 9 U 13/00 (Ger.) (holding that the fax could not be considered as an offer because it did not contain the determinations as to the nature of the goods and provisions for determining the quantity and the price, neither did the buyer know the plaintiff’s intent, nor could the buyer be aware of what that intent was); *Oberster Gerichtshof [OGH] [Supreme Court]* Mar. 20, 1997, docket No. 2 Ob 58/97m (Austria) (holding that a modification of the offer concerning the quantity of the goods which is exclusively favorable to the offeror would have to be considered non-material); *Oberlandesgericht Hamburg [OLG] [Provincial Court of Appeal]* Jul. 4, 1997, 1 U 143/95 and 410 O 21/95 (Ger.) (holding that the fax sent by the French company constituted an offer since it was sufficiently definite as to type of goods, price and quantity, and it indicated the offeror’s intention to be bound); *Cour de Cassation [Supreme Court]* Paris, Feb. 7 2012, 10-30912 (Fr.) (holding that although the parties had agreed that the basic price of the pears in Argentina (9 euros) would represent the “base” for the French company to start marketing the product, this did not mean that a minimum contractual price had been fixed); *Handelsgericht St. Gallen [HG] [Commercial Court]* Dec. 5, 1995, HG 45/1994

between the parties or usages or practices established between them.⁴⁶ If the parties conclude a valid contract without a price, the CISG provides a gap filler for price.⁴⁷ Thus, the CISG mandates greater detail and deliberateness in contract formation than the UCC. The rationale for increased detail is justified. Given the likelihood of language and cultural differences between the parties and the adverse impact of different time zones and geographical distances on the communications between the parties, the opportunity for confusion and misunderstanding increases, justifying greater precision for creating an offer. Therefore, a heightened manifestation of assent is required for beginning the process of contract formation if the CISG is applicable.⁴⁸

This factual requirement for the offer is not the sole distinction between the two legal regimes when addressing contract formation. Of significance is the determination of intention. Article 8 of the CISG establishes a subjective standard for intention and meaning rather than an objective standard for assessing a party's intent to contract and a subject standard for determining the meaning of terms in the first instance.⁴⁹ Both the

(Switz.) (holding that intention of the offeror to be bound was to be derived from the terms 'order', 'we order,' and 'immediate delivery' contained in the fax).

⁴⁶ CISG, *supra* note 15, art. 9 ("(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.").

⁴⁷ *Id.* art. 55 ("Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.").

⁴⁸ See E. Allan Farnsworth, *Article 18*, in *BIANCA-BONNEL COMMENTARY ON THE INTERNATIONAL SALES LAW* 163-74 (Giuffrè: Milan 1987) (*available at* <http://www.cisg.law.pace.edu/cisg/biblio/farnsworth-bb18.html>).

⁴⁹ CISG, *supra* note 15, art. 8 ("(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. (3) In determining the intent of a party or the understanding a reasonable person would have had, due

CISG and the Restatement assess intent and meaning from external objective indicators.⁵⁰ However, under the Restatement, if the objective manifestations would lead a reasonable person in the position of the recipient/offeree to believe the offeror intends to be bound, if the question is one of contract formation, the offeror's subjective intention or understanding of its actions or words, subjective meaning, is irrelevant.⁵¹ Similarly, the Restatement requires objective evidence to determine the mutual intent or objective meaning of the parties regarding the terms of their agreement. This objective evidence is used to detect a misunderstanding⁵² and to determine the scope of the contractual obligations by defining terms based on the objective meaning to these parties rather than the individual meaning of one of the parties in the absence of fault or the objective meaning to similarly situated reasonable parties. CISG relegates the objective meaning to a second tier of assessment.⁵³

A. Subjective Intent – the CISG

To the amazement of most domestic legal professionals, Article 8 (1) declares as the standard for determining the intent of

consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties.”).

⁵⁰ See generally CISG art. 8(3); Restatement § 212 & cmt. a, and Restatement § 2, *infra* n.50.

⁵¹ RESTATEMENT (SECOND) OF CONTRACTS § 2 (“(1) A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.”); *id.* at cmt. b (“The phrase “manifestation of intention” adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention.”); see also *id.* §§ 19-20 (explaining conduct that manifests assent and the effect of a misunderstanding).

⁵² *Id.* § 20.

⁵³ *Id.* § 20 cmt. b. (“Manifestation of Intention: As is made clear in Chapter 3, particularly §§ 17-20, the intention of a party that is relevant to formation of a contract is the intention manifested by him rather than any different undisclosed intention. The definitions of ‘promise,’ ‘agreement,’ and ‘term’ in §§ 2, 3 and 5 also refer to ‘manifestation of intention.’ It follows that the meaning of the words or other conduct of a party is not necessarily the meaning he expects or understands. He is not bound by a meaning unless he has reason to know of it, but the expectation and understanding of the other party must also be taken into account.”).

a contracting party – the party's subjective intent, the subjective *actual* intent of the person whose statement or conduct is being interpreted, rather than the understanding of a reasonable person in the other's position.⁵⁴ This emphasis on the actual, subjective, mental processes of the speaker or actor is, however, substantially limited by the reasonable understanding of the other party who is the recipient of the manifestation.⁵⁵ The speaker/actor's subjective intent only governs the interpretation of his/her statements or conduct if the other party knew or could not have been *unaware* of the speaker/actor's actual intent.⁵⁶ Observe that the CISG allocates any risk of error between the speaker's actual intent and what the hearer/recipient could not have been unaware to the hearer/recipient." If the hearer/recipient could understand or could have been aware of the speaker/actor's intention, the actual subjective intent the speaker/actor is the relevant intention.⁵⁷ The allocation of the risk in Article 8 of the CISG to the hearer/recipient is consistent with the general approach to error found in the CISG.⁵⁸ Consider the following hypothetical situation: a seller actually intends to sell Black Beauty, one of two horses that seller has advertised for sale. In negotiations with the buyer, statements made regarding the pedigree of the horse and awards are understood by both as references to Black Beauty. Later, in the written offer to sell, seller refers to his second horse, Midnight Warrior. The buyer signs the writing and her assent

⁵⁴ CISG, *supra* note 15, at art. 8.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Guang Dong Light Headgear Factory Co. Ltd. v. ACI International, Inc.*, Case No. 03-4165-JAR (Kan.) (2007), *available at*: <http://cisgw3.law.pace.edu/cases/070928u2.html> (court considers objective evidence and determines that the seller could not have understood the buyer's alleged subjective intent to serve as an intermediary rather than a contracting party to fourteen transactions between them); Bundesgerichtshof [BGH] [Federal Supreme Court] Nov. 27, 2007, X ZR 111/04 (Ger.), *available at*: <http://cisgw3.law.pace.edu/cases/071127g1.html> (the buyer's statements to the seller's employee and the terms of the contract amendment established that the seller could not have been unaware of the buyer's intent).

⁵⁸ *See, e.g.*, CISG art. 27 ("Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.").

creates a contract for Black Beauty because the buyer “could not have been unaware” of the seller’s actual intent.⁵⁹ Article 8 directs the court or tribunal to consider “all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.”⁶⁰ The parties have a contract for the purchase of Black Beauty.

Pursuant to the Restatement, the parties have a contract but it is subject to the seller’s right of avoidance for unilateral mistake. If we assume that the buyer assented to the terms of the offer aware of the seller’s mistake, a contract for Mighty Warrior results,⁶¹ but the seller’s attempt to avoid the contract for unilateral mistake⁶² should be successful because the buyer had reason to know of the seller’s scrivener error.⁶³

Article 4 of the CISG mandates that issues of validity are subject to the applicable domestic law as determined by the forum court’s private international law rules and are not within the scope of the CISG.⁶⁴ The foregoing “Black Beauty” hypothetical situation does not fall within Article 4, but within Article 8(1).⁶⁵

⁵⁹ *Id.* art. 8 (3).

⁶⁰ *Id.*

⁶¹ Restatement (Second) of Contracts § 20(b) & cmt. d, illus. 5.

⁶² *Id.* § 153(b).

⁶³ *Id.* § 19 cmt. b (“A person has reason to know a fact, present or future, if he has information from which a person of ordinary intelligence would infer that the fact in question does or will exist. A person of superior intelligence has reason to know a fact if he has information from which a person of his intelligence would draw the inference. There is also reason to know if the inference would be that there is such a substantial chance of the existence of the fact that, if exercising reasonable care with reference to the matter in question, the person would predicate his action upon the assumption of its possible existence.”).

⁶⁴ CISG, *supra* note 15, art. 4 (“This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage.”). But see Oberster Gerichtshof, docket no. 2 Ob 100/00 w, Austria, April 13, 2000 (court determines that CISG is applicable to resolve an issue of “mistake” despite article 4).

⁶⁵ See generally PETER SCHLECHTRIEM, UNIFORM SALES LAW - THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 39 (1986) (discussing the interpretation of statements and conduct). Accord Oberster Gerichtshof, *supra*, n. 64.

The court or tribunal seeking to interpret the manifestations, words, or conduct of the speaker/actor to determine the seller's actual intent *and* that which the hearer, the buyer, was reasonably aware of, should seize upon the statements made by the seller that clearly indicate that the sale of Black Beauty, not Mighty Warrior, was actually intended by the seller and understood by the buyer.⁶⁶ All relevant circumstances are used for determining whether the hearer/recipient "could not have been unaware" of the speaker/actor's actual intent. The determination of the hearer/recipient's understanding is an objective one.⁶⁷ Here, as with the determination of the seller's actual intent, all classes of evidence are admissible for determining the hearer/recipient's understanding of the speaker's actual intent; the listing of the classes of evidence in Article 8(3) is illustrative, not exhaustive.⁶⁸

⁶⁶ See CISG, *supra* note 15, art. 8(3) ("In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.").

⁶⁷ See, e.g., Bundesgerichtshof [Federal Supreme Court] Nov. 27, 2007, Case No. X ZR 111/04 (Ger.) (Seller knew, or could not have been unaware that buyer's real purpose of its proposed contract amendment was to conceal the real purchase price from its customers in Russia. Buyer's employees openly revealed this purpose at the time of the proposal and wording of the amendment indicated the buyer's intention to recover the purchase price increase received by the seller in full. These circumstances, together with life experience, resulted in a reasonable conclusion that the seller was in the position to understand that the consulting fees in the contract amendment had been erroneously calculated); see also U.N. Conference on CISG, 6th mtg., U.N. Doc. A/CONF.97 (Mar. 14, 1980) (Mr. Michida's comment during the debate regarding the United Kingdom's proposal to eliminate the "could not have been unaware" standard in Article 8 (1), stating "observing that representatives were divided over the United Kingdom proposal," reminded the meeting of the famous *Peerless* case. That had been the name of two different vessels and the purchaser of the cargo of the *Peerless* had relied on possible confusion between the two. With the existing text of article 7 [became CISG article 8], any confusion would have been impossible, as the purchaser "could not have been unaware" of the existence of two vessels of the same name. If the United Kingdom proposal was accepted, *there would no longer be an objective* criterion for settling such cases. For that reason his delegation could not support that proposal.") (emphasis added).

⁶⁸ MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova d'Agostino, S.p.A., 144 F.3d 1384, 1388 (11th Cir. 1998), *cert. denied*, 526 U.S. 1087 (1999); Filanto S.p.A. v. Chilewich Int'l Corp., 789 F.Supp. 1229 (S.D.N.Y. 1992); Bundesgerichtshof [Supreme Court] Dec. 11, 1996, VIII ZR 154/95 (Ger.).

Article 8 also governs the interpretation of statements and conduct by the parties for modification or termination of their agreement,⁶⁹ declaration of avoidance, revocation of the contract,⁷⁰ and statements or conduct of offer and acceptance.⁷¹ Indeed, any statement or conduct that is relevant to the performance of an obligation or the assertion of any right under the CISG, such as notices or other required communications regarding cure or delayed performance or missing specifications, are subject to the standards of Article 8.⁷² Article 48(3) appears to be an exception by expressing the meaning for any notice of performance given by the seller to the buyer after the date for performance or cure has passed.⁷³ Here, any statement of performance is to be treated as a request by the seller for notice of buyer's intent to accept the offer of cure.⁷⁴

⁶⁹ CISG, *supra* note 15, art. 29 (“(1) A contract may be modified or terminated by the mere agreement of the parties. (2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.”).

⁷⁰ *Id.* art. 26 (“A declaration of avoidance of the contract is effective only if made by notice to the other party.”).

⁷¹ *Id.* art. 8.

⁷² U.N. Secretariat, *Commentary on Article 7 of the 1978 Draft*, cmt. 1 (“Article 7 [draft counterpart of the Convention Article 8] on interpretation furnishes the rules to be followed in interpreting the meaning of any statement or other conduct of a party which falls within the scope of application of this Convention. Interpretation of the statements or conduct of a party may be necessary to determine whether a contract has been concluded, the meaning of the contract, or the significance of a notice given or other act of a party in the performance of the contract or in respect of its termination.”) (emphasis added).

⁷³ CISG, *supra* note 15, art. 48(3) (“A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.”).

⁷⁴ *Id.*; see also Official Commentary to 1978 Draft, Paragraph 13: “If the seller intends to cure the nonconformity, he will normally so notify the buyer. He will also often inquire whether the buyer intends to exercise his remedies of avoiding the contract or declaring the price to be reduced or whether he wishes, or will accept, cure by the seller.” See generally [Amtsgericht Nordhorn] June 14, 1994, 3 C 75/94 (Ger.), translated text available at <http://cisgw3.law.pace.edu/cases/940614gl.html> (holding that buyer accepted goods and failed to refuse an additional period of time for performance by the seller of its obligations).

B. When the Intentions of the Parties Do Not Conform

Some commentators suggest that Article 8 does not govern a misunderstanding when either the hearer could not have been aware of the speaker's actual intent, the standard of Article 8(1), or when a reasonable person's understanding of the speaker's intent, the standard of Article 8(2), would not conform to the intent of the hearer when he or she responds.⁷⁵ This is similar to the notorious *Peerless* case.⁷⁶ The buyer and seller agreed that buyer would purchase and the seller would deliver cotton "ex *Peerless* from Bombay." The seller sued the buyer after the buyer refused to accept the delivery of the cotton in December. The buyer defended that the agreement was for cotton delivered "ex *Peerless*" that arrived in October and the seller was not ready, willing, and able to perform. The facts suggest that from the circumstances, the buyer could not have been aware of the seller's actual intent of delivering the goods from "*Peerless* #2" sailing in December, and that a reasonable person would not have understood that the seller intended "*Peerless* #2." Furthermore, the seller could not have been aware that the buyer intended "*Peerless* #1" that sailed in October, and a reasonable person would not have understood the buyer intended "*Peerless* #1." Here, their relative intentions do not conform. Pursuant to the Restatement, no contract results.⁷⁷ The question is whether the CISG or domestic law governs the determination of whether a contract exists when the CISG is the applicable law. Article 7(2) provides:

Questions concerning matters governed by this the CISG

⁷⁵ SCHLECHTRIEM, *supra* note 65, ("The Convention does not regulate the consequences of a discrepancy between the actual but unrecognizable intent of a party on the one hand, and, on the other, either the objective meaning of that party's statement in the sense of Article 8(2) or the other party's response to the first statement where the intent of the parties does not coincide. The regulation of such discrepancies is a question for domestic law. It appears, however, that Article 8(1) and (2) prevents a party's purely subjective intent from being decisive (secret reservations!) and prescribes the solution found in § 117 of the German Civil Code for a sham statement. [116a] As far as *these* deficiencies in intent are concerned, domestic law is replaced by the Convention.").

⁷⁶ *Raffles v. Wichelhaus*, (1864) 159 Eng. Rep. 375 (Ex.); 2 Hurl. & c. 906.

⁷⁷ RESTATEMENT (SECOND) OF CONTRACTS § 20(1)(a) (saying "there is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and neither party knows or has reason to know the meaning attached by the other.").

which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

The CISG governs contract formation and the determination of intent. However, the CISG does not expressly settle the resolution of the issue of the failure of the parties' intentions to conform. Therefore, a better approach than resorting to domestic law in the first instance is the application of general principles on which the CISG is based, and if there are not any, to then resort to the law applicable by virtue of the rules of private international law. Such an approach would implement the foundational goals of the CISG, by giving regard to the CISG's "international character and to the need to promote uniformity in its application and the observance of good faith in international trade."⁷⁸

C. *Secret Reservation of Intent*

Commentators have raised for deliberation the impact of Article 8(1) on a party's subjective intent *not* to be bound when that intention is contrary to the reasonable meaning of the words and conduct of the party.⁷⁹ The infamous case of *Lucy v. Zehmer*⁸⁰ immediately comes to mind for domestic parties and their counselors. The buyer and seller were drinking at the seller's establishment. The seller's wife was there, working at the time. Winking at his wife, the seller accepted the buyer's offer to purchase their farm. The buyer agreed to purchase the farm. The seller and his wife signed a crudely drafted agreement and the buyer offered a binder or deposit which the seller declined. When sued for breach, the seller asserted he and his wife were only joking and therefore no contract was created between the parties. His actual subjective intent, the seller asserted, did not result in legal consequences. Ruling for the buyer, the court held that the reasonable understanding of the seller's actions and words, not his

⁷⁸ CISG, *supra* note 15, art. 7(1).

⁷⁹ Martin Schmidt-Kessel, *Article 8*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 145, 149 ¶ 7 (Ingeborg Schwenzer ed., 2010).

⁸⁰ *Lucy v. Zehmer*, 196 Va. 493 (1954).

subjective intent, governed the effect of his words and conduct. Would the outcome have been different had *Lucy v. Zehmer* been a transaction for goods subject to the CISG? The short answer is: it depends! Was the buyer aware or could the buyer have not been unaware of the seller's actual intent? If the buyer knew or could not have been unaware of the seller's actual intent, no contract results. The buyer's knowledge or understanding of the seller's actual intent based on all the circumstances circumscribes the effect of the seller's actual intent.⁸¹ Was the transaction that occurred at the tavern the first one between the parties or was this part of regularly occurring banter between two neighbors both knowing that neither was serious? What conduct did the seller engage in after the purported contract was formed? Although irrelevant when the objective theory of contract is the applicable approach for determining intent at contract formation, the seller's subsequent action is relevant in determining the seller's actual subjective intent when Article 8 is the applicable legal rule.⁸²

D. "Could Not Have Been Unaware" v. "Reason to Know"

Although domestic lawyers and judges may be confounded by the dominance of the subjective standard mandated by the CISG for determining intent, in the first instance, domestic lawyers and judges are very familiar with a varying standard of "knowledge" not only applicable to transactions in goods,⁸³ but also, according

⁸¹ U.N. Secretariat, *supra* note 72, cmt. 4 ("Article 7 [draft counterpart of the Convention Article 8] cannot be applied if the party who made the statement or engaged in the conduct had no intention on the point in question or if the other party did not know and had no reason to know what that intent was. In such a case, article 7(2) [draft counterpart of the Convention Article 8(2)] provides that the statements made by and conduct of a party are to be interpreted according to the understanding that a reasonable person [of the same kind as the other party] would have had in the same circumstances.").

⁸² See, e.g., *Franklins PTY LTD v Metcash Trading LTD* [2009] NSW (Austl.), available at <http://www.unilex.info/case.cfm?id=1520> (distinguishing the effect of subsequent conduct when the objective versus the subjective approach of the CISG and UNIDROIT is applicable to the transaction); see also CISG, *supra* note 15, art. 8.

⁸³ U.C.C. § 1-202 (1977): ("Notice; Knowledge. (a) Subject to subsection (f), a person has "notice" of a fact if the person: (1) has actual knowledge of it; (2) has received a notice or notification of it; or (3) from all the facts and circumstances known to the person at the time in question, has reason to know that it exists. (b) "Knowledge" means actual knowledge. "Knows" has a corresponding meaning. (c) "Discover," "learn," or words of similar import refer to knowledge rather than to reason to know.").

to the Restatement,⁸⁴ for licenses, services, and real estate contracts. Both legal systems authorize imputing “knowledge” of a fact if, under the CISG and the UCC,⁸⁵ the recipient of the conduct or words, or under the Restatement, a person of ordinary intelligence in the position of the hearer/observer, could *infer* from the facts and circumstance the existence of a fact⁸⁶ even though the recipient or person does *not* have actual knowledge “and/or” conscious belief in the fact’s existence.

E. Subjective Intent and Contract Interpretation

Although not expressly stated in the CISG, it is presumed that Article 8 governs the interpretation of contract provisions and terms as well.⁸⁷ Consider the following hypothetical situation:

A Norwegian buyer visits a trade show in New York. While there she discusses with a U.S. seller her needs for insulation for rubber fishing boots that she manufactures. They discuss the materials used in manufacturing the boots and the different grades of insulation manufactured by the seller. The seller makes a specific recommendation of one its products. The parties exchange business cards with contact information that included geographical location, telephone and fax numbers, and email addresses. Thereafter, the buyer ordered via fax on her business letterhead and the seller delivered to Norway the

⁸⁴ RESTATEMENT (SECOND) OF CONTRACTS § 19 cmt. b (1981) (“‘Reason to know.’ A person has reason to know a fact, present or future, if he has information from which a person of ordinary intelligence would infer that the fact in question does or will exist. A person of superior intelligence has reason to know a fact if he has information from which a person of his intelligence would draw the inference. There is also reason to know if the inference would be that there is such a substantial chance of the existence of the fact that, if exercising reasonable care with reference to the matter in question, the person would predicate his action upon the assumption of its possible existence. Reason to know is to be distinguished from knowledge and from “should know.” Knowledge means conscious belief in the truth of a fact; reason to know need not be conscious. “Should know” imports a duty to others to ascertain facts; the words “reason to know” are used both where the actor has a duty to another and where he would not be acting adequately in the protection of his own interests were he not acting with reference to the facts which he has reason to know.”).

⁸⁵ See CISG, *supra* note 15; see U.C.C. § 1-202 (a)(3).

⁸⁶ RESTATEMENT (SECOND) OF CONTRACTS § 19 cmt. b.

⁸⁷ MMC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova d’Agostino, S.P.A., 144 F.3d 1384 (11th Cir. 1998).

previously recommended insulation. The buyer used the insulation for her manufacturing process in Norway and distributed her output to the Scandinavian fishing industry. The insulation proved insufficient, resulting in cracks and ruptures in the boots, physical injury to the wearer, and liability for the buyer to her end users. The seller argues that it isn't liable for breach of an express or implied obligation of fitness.⁸⁸

Of concern is whether the seller was aware that the insulation was to be used in Norway and needed to be "fit" for winter weather there. Prevailing case authority holds⁸⁹ that a seller is only obligated to provide goods that are fit for the buyer's purposes at the place of their intended use if: (1) the standards are the same at the place of the buyer's intended use and seller's location; (2) the buyer has informed the seller of the regulations at the location of its intended use or (3) if special circumstances, such as the existence of a seller's branch office in the buyer's state, the seller knew or should have known about the regulations.⁹⁰ Applying Article 8(1)'s subjective standard to the facts of the hypothetical setting, the Norwegian buyer's statement regarding the location of her business, the address on her business card, information shared when discussing her use of the insulation for the Norwegian fishing industry or in placing the order or communicating with the seller, and the requested destination for the delivery of the goods, all support a conclusion that the seller could not have been unaware of the buyer's intended use in Norway. If, however, the buyer shipped her wares to Russia for sale, the seller would not have been aware of the buyer's intended use in Russia. The question is whether under the circumstances, including practices or course of dealings, the seller was aware.⁹¹ If

⁸⁸ This problem is a modification of the "Insulation Sold to Germany" problem appearing in and reprinted with permission of West Academic from FOLSOM, GORDON, & SPANOGLE, *INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEM ORIENTED COURSEBOOK* 75-76 (9th ed. 2009).

⁸⁹ See *Oberster Gerichtshof [OGH]* Apr. 13, 2000, docket No. 2 Ob 100/00 (Austria), available at <http://www.unilex.info/case.cfm?id=687>; *Medical Mktg. Int'l, Inc. v. Internazionale Medico Scientifica, S.R.L.*, 1999 U.S. Dist. LEXIS 7380, at *5 (E.D. La. 1999).

⁹⁰ See *Medical Mktg.*, 1999 U.S. Dist. LEXIS at *6.

⁹¹ See *supra* note 67 and accompanying text for a discussion of the "could not have been unaware" standard.

The seller could not have been unaware of the buyer's intended use in Norway, was the seller obligated to supply insulation that was fit for use in Norway as Article 8(1) mandates?⁹²

German courts, the first to address the question of the applicable locale for determining if the seller met its obligation under Article 35(2)(a), chose to interpret the duty imposed on the seller of providing goods that conform to the ordinary purpose of such goods without reference to Article 8.⁹³ Rather, the seller's

⁹² See Clout case # 202, French Court of Appeals (Grenoble) (1996) (based on course of dealings, Italian seller knew goods were destined for the French market and seller was obliged under art. 8(1) to comply with French marketing regulations). See also Text of Secretariat Commentary on article 33 of the 1978 Draft [*draft counterpart of CISG article 35*] [*Conformity of the goods*] for the varying positions on the applicable locale for determining if the seller fulfilled its obligation at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-35.html>.

⁹³ Oberlandesgericht (OLG) Apr. 20, 1994, docket no. 13 U 51/93 (Ger.) (goods can be conforming even if the seller does not comply with the public law provisions concerning the merchantability of the goods in force in each of the countries where the goods might be exported), *aff'd*, Bundesgerichtshof (BGH) Mar. 8, 1995, docket no. VIII ZR 159/94 (Ger.) (seller could only be expected to conform goods to buyer's country's standards: (1) where the same rules also exist in the seller's country; (2) where the buyer draws the seller's attention to their existence; (3) or, possibly, where the seller knows or should know of those rules due to "special circumstances," such as (i) when the seller has a branch in the buyer's country, (ii) when the parties are in a longstanding business relationship, (iii) when the seller regularly exports in the buyer's country, or (iv) when the seller advertises its own products in the buyer's country); Landgericht Ellwangen (LG) Aug. 21, 1995, docket no. 1 KfH O 32/95 (Ger.) (in light of their previous commercial relationships, the parties had impliedly agreed that the goods should comply with the standards provided by the buyer's law on food); Oberlandesgericht (OLG) Jan. 29, 2004, docket no. 8 O 57/01 (Ger.) (rejecting the buyer's argument that it was not liable if goods failed to meet the public law requirements of its country, the goods lack of certification that they were not contaminated would prevent the sale in the seller's country by virtue of EU rules), *aff'd*, Bundesgerichtshof (BGH) Mar. 2, 2005, docket no. VIII ZR 67/04 (Ger.); *accord* Oberster Gerichtshof (OGH) Apr. 13, 2000, docket No. 2 Ob 100/00 (Austria) (remanding, the Supreme held, the seller cannot generally be expected to observe special public law requirements in the buyer's country, not even when the seller knows in which country the goods will be exported); Audiencia Provincial de Granada (A.P.) Mar. 2000, docket no. 143/2000 (Spain) (US buyer sued Spanish seller after frozen chicken delivered to the Ukraine for distribution failed to meet Ukrainian law; held: the mere circumstance that the goods failed to meet the specific law requirements of the country in which they would be marketed did not automatically mean that they should be deemed unfit for ordinary use if they complied with the law requirements of their country of origin, if the buyer had not specifically mentioned this necessity to the seller and, especially, if the buyer, as here, had examined and approved a sample of the same goods beforehand; *Medical Mktg.*, 1999 U.S. Dist. LEXIS at *6.

duty under Article 35(2)(a) is interpreted as one of complying with the standards of its own place of business⁹⁴ in the absence of an agreement to provide goods that conform to the buyer's place of business,⁹⁵ or the presence of the same standards in both the buyer's and the seller's locale, or special circumstances. The risk of purchasing goods that do not conform to the place of the buyer's intended distribution or use is allocated to the buyer; the obligation of determining the applicable standard of performance for the goods in the place of distributing or marketing of the goods is allocated to the buyer; as well as the ascertaining of the relative consistency between the standards of seller's place of business and those of the place of the intended use is allocated to the buyer. This allocation is a reasonable addition to the due diligence that a buyer undertakes in selecting its supplier.

IV. Offers: Duration and Revocability of Offers

Domestic common law of contracts provides that offers are effective upon receipt⁹⁶ and any durational period commences upon receipt.⁹⁷ Offers are generally revocable.⁹⁸ Absent consideration or another validating device, a promise not to revoke the offer being made or an offer stating a duration period is a *nudum pactum*, a naked promise, and is merely an offer to make an unenforceable gift.⁹⁹ If the offer states a duration period for acceptance or a statement that it will not be revoked, the offer is revocable until accepted. The UCC modifies this result for the signed written offers or records¹⁰⁰ bearing an electronic

⁹⁴ Bundesgerichtshof (BGH) Mar. 8, 1995, docket no. VIII ZR 159/94 (Germ.) (stating that the standards of the seller's country specify the suitability of an ordinary usage).

⁹⁵ Audiencia Provincial de Pontevedra (A.P.) Oct. 3, 2002, docket no. AC 2002\1851 (Spain) (an explicit term of the contract placed the responsibility on the seller if the goods were unfit for importation into Jordan according to Jordanian health authorities' standards).

⁹⁶ See Restatement (Second) of Contracts § 63 (1981).

⁹⁷ *Id.*

⁹⁸ *Id.* § 42 cmt. a.

⁹⁹ *Id.*

¹⁰⁰ THE UNIF. ELEC. TRANSACTIONS ACT § 2 (13) 7A U.L.A. 225 (2002) [hereinafter UETA] ("Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.).

signature¹⁰¹ of a merchant that uses language such as “guaranteed,” “irrevocable,” or “firm” that assures the offeree that the offer will not be revoked.¹⁰² Without consideration, these offers are irrevocable for the period stated or a reasonable time if the offer lacks a durational term but not longer than ninety (90) days despite the stated term unless the offeree provides consideration.¹⁰³ Absent language that provides evidence of an intent to make the offer “firm,” language such as “open” or “good” should be treated as language of duration and the general rule of revocability should apply.¹⁰⁴ Given the abrogation of the need for consideration or estoppel to prevent revocation of an offer, language that satisfies Section 2-205 must be expressive of a commitment not to revoke, some unambiguous heightened manifestation that is distinguishable from language of duration.¹⁰⁵ The example used by the commentary to Section 2-205 to illustrate the application of the effect of the section when the period of irrevocability is linked to the happening of a contingency supports this position. “If the offer states that it is ‘guaranteed’ or ‘firm’ until the happening of a contingency which will occur within the three month period, it will remain irrevocable until that event.”¹⁰⁶ Here, language indicating a heightened manifestation is present. An offer with terms such as “good” or “open,” even if in a signed record by a merchant, remains revocable.

Offers subject to the CISG are effective upon receipt.¹⁰⁷ Consistent with the law governing domestic offers, offers are

¹⁰¹ *Id.* § 2(8) (“Electronic signature” means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”).

¹⁰² U.C.C. § 2-205 (1977).

¹⁰³ *Id.* (“Firm Offers: An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months.”). See also *Id.* cmt. 3

¹⁰⁴ *Id.* cmt. 3 (“If the offer states that it is “guaranteed” or “firm” until the happening of a contingency which will occur within the three month period, it will remain irrevocable until that event.”).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ CISG, *supra* note 15, art. 15 (“(1) An offer becomes effective when it reaches the offeree. (2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.”).

generally revocable and may be revoked if the revocation reaches the offeree before a contract is created either by an oral acceptance of the offer,¹⁰⁸ or performance constituting acceptance,¹⁰⁹ or if the revocation reaches the offeree before the acceptance is dispatched.¹¹⁰ Dispatch of an acceptance creates an irrevocable offer and not a contract. This modified "mailbox rule" is a compromise position between the general policy view of the revocability of offers at Common Law and the general policy view of the irrevocability of offers recognized by Civil Law.¹¹¹ However, the similarity between the treatment of offer in U.S. domestic law and the treatment of offers pursuant to the CISG ends here.

If an offer states that it is "open" for a stated period of time or a durational period is included in the offer, or the offer includes a commitment not to revoke, or a statement that a reasonable person would understand as meaning the offer is irrevocable,¹¹² or if it is reasonable for the offeree to rely on the offer as irrevocable followed by actual reliance,¹¹³ an irrevocable offer is created for the duration stated. If the offer does not state the period of time for which it is open or irrevocable, the offer is irrevocable for a reasonable time.¹¹⁴ The CISG is only applicable to transactions between commercial parties.¹¹⁵ Therefore, the effect of Article 16(2) is analogous to that of the UCC, but without the formalities imposed by the UCC, protecting potential reliance by a

¹⁰⁸ *Id.* art. 16(1) ("Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.").

¹⁰⁹ *See id.* art. 18(3).

¹¹⁰ *Id.* art. 16(1) ("Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance."). *See text and notes, infra*, at note 128 for a discussion of acceptance by promise.

¹¹¹ Secretariat Commentary on Article 14 of the 1978 Draft of the CISG cmt. 5, <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-16.html#1>.

¹¹² CISG, *supra* note 15, art. 8(2)-(3).

¹¹³ *Id.* art. 16(2)(b) ("If it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.").

¹¹⁴ *Id.* art. 8(2).

¹¹⁵ *Id.* art. 2(a) ("This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use."); *Id.* at art. 1(a) ("This Convention applies to contracts of sale of goods *between parties whose places of business* are in different States.") (emphasis added).

commercial party who might be induced to delay its acceptance, or to undertake extensive investigations of the offer or the offeror, or engage in negotiations with others for related inputs for its processes or otherwise change position because of the presence of such language. Article 16(2) “reflects the judgment [sic] that in commercial relations, and particularly in international commercial relations, the offeree should be able to rely on any statement by the offeror which indicates that the offer will be open for a period of time.”¹¹⁶

Because offers are only effective when they “reach” the offeree, an offer may be withdrawn even if, by its terms, it is irrevocable. However, the withdrawal must reach the offeree before or at the same time as the offer.¹¹⁷ The arrival of two conflicting manifestations results in the absence of an intention to be bound.¹¹⁸ An offer subject to the CISG “reaches” the offeree when it is made to the offeree orally or delivered by “any other means” to him personally or to his place of business.¹¹⁹ For electronic communications, the determination of the “time” when the communication is delivered to the offeree should be made using the relevant law governing electronic communications. This law might be the United Nations Convention on the Use of Electronic Communications in International Contracts¹²⁰ or the

¹¹⁶ Secretariat Commentary, *supra* note 111, cmt. 6.

¹¹⁷ CISG, *supra* note 15, art. 15(2) (“An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.”).

¹¹⁸ *See id.* art. 14(1).

¹¹⁹ *Id.* art. 24 (“For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention “reaches” the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.”). See also CISG-AC Opinion no 1, Electronic Communications under CISG, 15 August 2003 (Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden)(recognizing that the absence of a form requirement under CISG supports electronic communications and identifying the complexities of determining “reached” when electronic communications are used); available at: <http://www.cisg.law.pace.edu/cisg/CISG-AC-op1.html>.

¹²⁰ U.N. Convention on the Use of Electronic Communications in International Contracts art. 10(2), UN Doc. A/RES/60/515 (Nov. 23, 2005) (defining the time of receipt as “the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee”). [hereinafter Electronic Communications Convention]. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being

Uniform Electronic Transactions Act,¹²¹ or domestic legislation enacted by a nation based on the 1996 UNCITRAL Model Law on Electronic Commerce.¹²² Evolving from the 1996 Model Law to the refined 2005 Convention, prevailing law governing electronic communication defines “receipt” as the time the transmission is retrievable by the offeree.¹²³ Each of these regimes permits the parties to derogate or vary the definition by an agreement. Each regime imposes limits on information received at an information processing system other than that designated or used by the recipient: U.S. domestic law only recognizes a communication as received if the information is sent to the information processing system designated or used by the recipient;¹²⁴ the Model Act deems information sent to an undesignated system as received when the data message is *actually* retrieved by the addressee;¹²⁵ and the most modern regime, the Electronic Communications Convention, uses the time when the transmission is capable of being retrieved by the addressee at that address and the addressee is aware that the electronic communication has been sent to an

retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee’s electronic address. *Id.*

¹²¹ UETA § 15(b) (“Unless otherwise agreed between a sender and the recipient, an electronic record is received when: (1) it enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and (2) it is in a form capable of being processed by that system.”).

¹²² UNCITRAL Model Law on Electronic Commerce art. 15(2), June 12, 1996, 36 I.L.M. 197. Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows: (a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs: (i) at the time when the data message enters the designated information system; or (ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee; (b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee. *Id.*

¹²³ See UETA § 15(b), *supra* note 121; see UNCITRAL Model Law on Electronic Commerce, *supra* note 122.

¹²⁴ See UETA § 15(b).

¹²⁵ See UNCITRAL Model Law on Electronic Commerce, *supra* note 122, art. 15(2).

address other than that designated.¹²⁶

Although offers subject to the CISG are effective when they “reach” the offeree, the time at which the durational period commences varies based on the medium used to communicate the offer.¹²⁷ Unlike U.S. domestic law, which commences the running of the duration of offers upon receipt,¹²⁸ the CISG makes a distinction based on the use of third party transmitters and a transmission of the offer by the offeror.¹²⁹ For transmissions involving third parties such as telegrams, the duration commences when the information is “handed over” for transmission; for a mailing or the analogous use of express delivery service, the duration commences on the date of the letter or on the date on the envelope if the letter is undated.¹³⁰ The likelihood that the offeree might discard the envelope and the potential failure of the offeror to record the date of mailing were the bases for selecting the date of the letter rather than the postmark or the mailing date, as both parties are likely to have retained the letter or its copy.¹³¹ If the offer is communicated by means of instantaneous electronic communication such as telephone, telex, email, or text message,

¹²⁶ UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS, art. 10(2), U.N. Sales No. E.07.V.2 (2005).

¹²⁷ CISG, *supra* note 15, art. 20(1), U.N. Sales No. E.10.V.14 (2010) (“A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.”).

¹²⁸ See generally *Caldwell v. Cline*, 109 W. Va. 553 (1930) (holding that an offer to exchange lands is not completed until the offeree has received the offer).

¹²⁹ CISG, *supra* note 15, art. 20(1) (“A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.”). Cf. UNIDROIT Principles of International Contracts art. 2.1.8 that uses the date of dispatch, the putting of the communication whether email or letter beyond the control of the offeror, as the relevant date for the fixed duration of an offer to commence.

¹³⁰ CISG, *supra* note 15, art. 20(1).

¹³¹ *Text of Secretariat Commentary on Article 18 of the 1978 Draft* (Draft Counterpart of CISG Article 20) (1978).

the duration commences "the moment the offer reaches the offeree."¹³² Intervening official holidays and non-business days are included in calculating the expiration date.¹³³ However, if the last day of the period falls on an official holiday or non-business day *at the place of acceptance*, the period is extended to the next business day.¹³⁴ Care must be taken by the offeree to avoid assuming that official holidays and non-business days at its locale are identical to those at the offeror's location or that the offeree's holidays and non-business days are relevant in calculating the expiration of the offer. The offeror's location is the "place of acceptance" unless otherwise designated in the offer.¹³⁵

In assessing the varying approaches between U.S. domestic law and that of the CISG on irrevocable offers, the formalities imposed by domestic law are cumbersome, imposing a significant proof burden on the party asserting that the offer was irrevocable. These formalities may be justified by the abrogation of the historically required validating device of consideration that satisfied cautionary and channeling functions of form,¹³⁶ a *cautionary function* of guarding "the promisor against ill-considered action," and a "*channeling* or signaling function, to distinguish"¹³⁷ an enforceable transaction "from other types and from tentative or exploratory expressions of intention."¹³⁸

As an autonomous harmonized legal regime without the historical precedent that supplements the UCC, the CISG operates with greater flexibility in recognizing the needs of commercial parties and the realities of trading across international borders.

¹³² CISG, *supra* note 15, at 20(1).

¹³³ *Id.* art. 20(2) ("Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.").

¹³⁴ *Id.*

¹³⁵ See generally SCHLECHTRIEM, *supra* note 65 ("Parties in international trade cannot be expected to adjust to various national, regional or local holidays.").

¹³⁶ RESTATEMENT (SECOND) OF CONTRACTS § 75 cmt. a ("[T]he fact of bargain also tends to satisfy the cautionary and channeling functions of form.").

¹³⁷ *Id.* § 72, cmt. c.

¹³⁸ *Id.*

However, the common law rule governing the calculation of any period by commencing the period on receipt regardless of the medium used to communicate the offer provides ease of application and avoids confusion. Although a fact-sensitive determination, given the possibility of enormous geographical distance that might exist between the parties and the corresponding period for non-electronic communications to travel that distance for mail or telegram delivery systems, the CISG protects the offeror from the risk of inordinate offer periods through the application of its rule. Given the burgeoning use of electronic communications and the availability of express mail, the receipt rule is likely to be applicable more often than not.

V. Acceptance

Unless the offeror unambiguously directs otherwise, UCC Section 2-206 provides that acceptance may be made in any reasonable manner, promise or performance, and communicated by any reasonable medium -- letter, fax, smoke signal, or email.¹³⁹ Supplemented by the common law rules regarding acceptance, acceptance for contracts for the sale of goods is effective upon dispatch.¹⁴⁰ Despite the contrary position of the Second Restatement on the Law of Contracts that acceptance by instantaneous communication should be treated as though the parties are in each other's presence and thereby subject to a receipt rule,¹⁴¹ prevailing authority holds that the dispatch rule,

¹³⁹ U.C.C. § 2-206 (1977) ("Offer and Acceptance in Formation of Contract. (1) Unless otherwise unambiguously indicated by the language or circumstances (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances; (b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer. (2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.").

¹⁴⁰ *Id.* § 1-103(b).

¹⁴¹ RESTATEMENT (SECOND) OF CONTRACTS § 64 ("Acceptance given by telephone or other medium of substantially instantaneous two-way communication is governed by the principles applicable to acceptances where the parties are in the presence of each other.").

historically implemented for responses by mail, is applicable for communication by telephone and telex.¹⁴² This application should be extended to email, fax, video conferencing, and text messaging rather than the “when heard” or “received” rule that governs parties dealing in each other’s presence in order to simplify the law and minimize confusion.¹⁴³

Rather than a dispatch rule for acceptance, the CISG requires receipt by the offeror¹⁴⁴ before the expiration of the time fixed for an acceptance to be effective.¹⁴⁵ Although an offer becomes irrevocable once the offeree has dispatched its acceptance, actual receipt of the acceptance is required for contract formation.¹⁴⁶ Unless the circumstances otherwise indicate a different result, acceptance of an oral offer is required immediately.¹⁴⁷ Currently, no case authority addresses this rule or the substantially similar rule of the UNIDROIT Principles for International Contracts.¹⁴⁸

¹⁴² See *Linn v. Employers Reinsurance Corp.*, 139 A.2d 638 (Penn. 1958); see also *United States v. Bushwick Mills*, 165 F.2d 198 (2d Cir. 1947); *Rothenberg v. H. Rothstein & Sons*, 181 F.2d 345 (3d Cir. 1950); *Toll v. Tannenbaum*, 982 F. Supp. 2d 541 (E.D. Penn. 2013); *Cardon v. Hampton*, 109 So. 176 (Ala. Ct. App. 1926); *Bank of Yolo v. Sperry Flour Co.*, 74 P. 855 (Cal. 1903); *Bundsen v. Worker’s Comp. App. Bd.*, 195 Cal. Rptr. 10 (Cal. Ct. App. 1983); *Pearson v. Electric Service Co.*, 201 P.2d 643 (Kan. 1949); *Graham v. TSL, Ltd.*, 350 S.W.3d 430 (Ky. 2011); *Traugott v. Virginia Transp.*, 341 S.W.3d 115 (Ky. 2011); *Dudley A. Tyng & Co. v. Converse*, 146 N.W. 629 (Mich. 1914); *Kay v. Kay*, 957 N.Y.S.2d 636 (N.Y. Sup. Ct. 2010); *Harshberger v. Reliable-Aire, Inc.*, 619 S.W.2d 478 (Tex. Civ. App. 1981); *Traders Oil Mill Co. v. Arnold Bros. Gin Co.*, 225 S.W.2d 1011 (Tex. Civ. App. 1949).

¹⁴³ *But see* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 177 § 3.22 (3rd ed. 1999).

¹⁴⁴ CISG, *supra* note 15, art. 18(2) (“An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.”).

¹⁴⁵ Case No. 7844/1994, (ICC Int’l Ct. Arb. 1994).

¹⁴⁶ CISG, *supra* note 15, art. 23 (“A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.”).

¹⁴⁷ *Id.* art. 18(2) (“An oral offer must be accepted immediately unless the circumstances indicate otherwise”).

¹⁴⁸ Int’l Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts* art. 2.1.7 (Time of Acceptance) (2010) (“An offer

An oral offer should include not only conversations when the parties are in each other's presence, but also communications by telephone and video conferencing.

As a result of the CISG's receipt rule, rather than a dispatch rule, the risk of delay or non-receipt is placed on the offeree rather than the offeror. Common law tradition allocates the risk to the offeror who, as master of the offer, could have required receipt of the acceptance before contract formation and has not done so. In so allocating the risk to the offeror, the contract was formed at the point of the objective manifestation by the offeree, binding both parties and nullifying the offeror's power to revoke between the time of the offeree's manifestation and the offeror's receipt. This common law approach protects the offeree's possible change of position in reliance on the anticipated contract.¹⁴⁹ The CISG addresses these risks by prohibiting the offeror's revocation of the offer after the acceptance is dispatched,¹⁵⁰ while placing the risk of delay in transmission on the party best able to avoid or minimize the delay, the offeree. However, the risk of aberrant or abnormal delay is minimized if the actual transmission bears evidence that if normal transmission had occurred, the acceptance would have been received in a timely fashion. Article 21 of the CISG makes such abnormally late acceptances effective unless the offeror gives prompt oral notice or promptly dispatches notice that the offer lapsed.¹⁵¹

Unlike the dispatch rule of the common law, the receipt rule creates an opportunity for the offeree to withdraw its acceptance if the withdrawal reaches the offeror before or at the same time as

must be accepted within the time the offeror has fixed or, if no time is fixed, within a reasonable time having regard to the circumstances, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.”).

¹⁴⁹ JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 160-162 (Harry M. Flechtner ed., Kluwer Law Int'l 3d ed. 2009).

¹⁵⁰ See CISG, *supra* note 15, art. 16 (discussing the effect of the dispatch of the acceptance).

¹⁵¹ *Id.* art. 21(2) (“If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.”).

the acceptance.¹⁵² An overtaking withdrawal of acceptance is effective. Such action by an offeree, subject to the domestic dispatch rule, is an impermissible attempted revocation of acceptance.¹⁵³ It may be treated as a repudiation of the contract formed upon dispatch of the acceptance or, if the offeror chooses, may be treated as an offer to rescind the contract.¹⁵⁴

Both approaches to designating the effective point for the act constituting acceptance address problems inherent in any approach. The CISG's use of one approach for all modes of transacting results in certainty and predictability for offerees and their attorneys and also minimizes confusion. Both approaches empower the offeror to conclude a contract by either treating the late acceptance as effective if followed by prompt notice,¹⁵⁵ or by treating the late acceptance as a counteroffer available for the offeror's acceptance.¹⁵⁶ The offeror's inaction after receipt of a late acceptance gives effect to the terms of the offer, avoids the extension of a contractual obligation liability when the offeree fails to act with greater promptness, and maintains the offeror's position of master of its offers. Both approaches recognize that a rejection of an offer is effective upon receipt. Both authorize irrevocable offers, but only the CISG empowers the offeree to reject an irrevocable offer before the period of irrevocability has expired in the absence of reliance on the rejection by the offeror.¹⁵⁷ At common law, once an option contract was created, conduct by

¹⁵² *Id.* art. 22 ("An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.").

¹⁵³ RESTATEMENT (SECOND) OF CONTRACTS § 63 cmt. a (1981).

¹⁵⁴ *Id.* cmt. c.

¹⁵⁵ CISG, *supra* note 15, art. 21(1) ("A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect").

¹⁵⁶ RESTATEMENT (SECOND) OF CONTRACTS § 70 ("Effect of Receipt by Offeror of a Late or Otherwise Defective Acceptance: A late or otherwise defective acceptance may be effective as an offer to the original offeror, but his silence operates as an acceptance in such a case only as stated in § 69.").

¹⁵⁷ CISG, *supra* note 15, art. 17 ("An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror."); *cf.* RESTATEMENT § 37 ("Termination of Power of Acceptance Under Option Contract. Notwithstanding §§ 38-49, the power of acceptance under an option contract is not terminated by rejection or counter-offer, by revocation, or by death or incapacity of the offeror, unless the requirements are met for the discharge of a contractual duty.").

an offeree constituting a rejection of the offer does not terminate the option absent reliance on the rejection by the offeror.¹⁵⁸

A. Battle of the Forms – Distinguishable Theoretical Approaches

1. Battle of the forms -- The UCC

No change of the common law rules by the UCC has generated as much discussion and angst as the promulgation and codification of UCC Section 2-207, the "Battle of the Forms."¹⁵⁹ Abrogating both the mirror image rule and the last shot rule, UCC Section 2-207 authorizes the formation of a contract if the acceptance assents to the bargained-for or dickered-for material terms of price, quantity, subject matter, and delivery but introduces additional and/or different terms to the proposed exchange.¹⁶⁰ With these new proposals, the acceptance does not mirror the offer but it is not treated as a counteroffer unless the communication expresses an unwillingness to go forward with the transaction in the absence of *assent* to the additional or different terms.¹⁶¹ If this condition is not included in the offeree's purported acceptance, a contract is created based on the offeree's assent to the bargained-for terms and the boilerplate on the reverse side, if any, on the offeror's form.¹⁶² When the parties are merchants, professional rather than

¹⁵⁸ RESTATEMENT § 37, *supra* note 157.

¹⁵⁹ U.C.C. § 2-207 (1977) ("Additional Terms in Acceptance or Confirmation. (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received. (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.").

¹⁶⁰ *Id.* § 2-207(1).

¹⁶¹ *Id.*

¹⁶² *See, e.g.,* Energy Mktg. Servs., Inc. v. Homer Laughlin China Co., 186 F.R.D. 369, 374 (S.D. Ohio 1999), *aff'd*, 229 F.3d 1151 (6th Cir. 2000) (holding that when a

casual buyers and sellers with knowledge of general business practices,¹⁶³ Section 2-207(2) is applied to determine the impact, if any, of the offeree's terms on the contract created by the offeree's assent.¹⁶⁴

Assume, however, that the offeree's purported acceptance includes an explicit condition that the acceptance is conditioned on "assent" to the additional or different terms. This purported acceptance constitutes a counteroffer and this counteroffer, according to the prevailing approach, may only be accepted by the offeror *expressly* assenting to the offeree's additional terms — the manner of assent required by the express condition.¹⁶⁵ Despite the creation of a counteroffer with the required conditional language and the failure of the other party to provide the required express assent to the additional or different terms, if the parties proceed with their transaction and both parties engage in conduct that manifests an intent to contract, such as the seller's shipment of the goods and the buyer's payment for the goods, a contract is formed.¹⁶⁶ Section 2-207(c) governs the determination of the terms. The terms of this contract are: (1) the terms upon which the writings previously exchanged by the parties agree and (2) supplementary terms from the UCC gap-fillers.¹⁶⁷ Formerly, the common law, via the last shot rule, made the counteroffer the operative document for determining the terms of the agreement.

transaction is between merchants, a differing form operates as an acceptance of the contract and the additional terms become part of the contract unless: (1) the offer expressly limits acceptance to the original terms; (2) the additional terms materially alter the contract; or (3) notification of objection to the additional terms has already been given or within a reasonable time after notice of them is received).

¹⁶³ U.C.C. § 2-104(1), § 2-104(3), cmts. 1-2.

¹⁶⁴ See *id.* § 2-207(2).

¹⁶⁵ See *PCS Nitrogen Fertilizer, L.P., f/k/a Arcadian Fertilizer, L.P. v. The Christy Refractories, L.L.C.*, 225 F.3d 974 (8th Cir. 2000); *Commerce & Industry Insurance Company v. Bayer Corp.*, 433 Mass. 388, 742 N.E.2d 567, 44 UCC Rep.Serv.2d 50 (2001); see also *Diamond Fruit Growers, Inc. v. Krack Corporation*, 794 F.2d 1440, 1443 (9th Cir. 1986) (the buyer objected to additional terms stated in the seller's acceptance expressly conditioned upon assent to those terms thereafter with knowledge of the terms accepted goods shipped by the seller; UCC 2-207(3) governed the agreement between the parties).

¹⁶⁶ U.C.C. § 2-207, cmt. 7.

¹⁶⁷ *Id.* § 2-207(3).

Section 2-207 renders the last shot rule ineffective; it is thereby abrogated.¹⁶⁸ The party who transmits the last form no longer controls the terms of the agreement if the communication assents to the dickered for terms unless the offeree insists on assent to its additional terms and obtains that assent. Otherwise, the effect of additional terms in an acceptance is determined by either subsection 2-207 (2) or 2-207(3). In the latter case, the intent to be bound is based on the conduct following the exchange of forms and is sufficient to create the contract. The exchanged forms provide some of the terms upon which the parties were willing to contract and provide a reasonably certain basis for a remedy. These terms and applicable default rules of Article 2 are the terms of the contract.¹⁶⁹ The operation of Section 2-207 demonstrates the substantive preference for contract formation by both the drafters who promulgated the section and legislatures who codified it. A contract is always formed if assent is given to the bargained-for terms under subsection 2-207(1) or if conduct by both parties under subsection 2-207(3) indicates assent to the bargained-for terms. This preference or policy goal is consistent with other policy goals reflected in the UCC such as “keep the deal together.”¹⁷⁰

Several contemporary scholars assert that Section 2-207(3) is also applicable if the offeree’s response to an offer is in fact a common law counteroffer,¹⁷¹ not a purported acceptance, and the parties proceed to perform.¹⁷² Here, they argue the agreement, as

¹⁶⁸ See generally, *Dorton and J. A. Castle, Partners, d/b/a The Carpet Mart v. Collins & Aikman Corporation and Painter Carpet Mills, Inc.*, 453 F.2d 1161, 1166 (6th Cir. 1972); 1 *Hawklund UCC Series* § 2-207:1 (common law rules for contract formation often lead [sic] to the formation of a contract on the terms in the last communication, and came to be known as the “last shot” rule).

¹⁶⁹ U.C.C. § 2-207.

¹⁷⁰ See, e.g., *id.* §§ 2-609-610(b), § 1-308(a).

¹⁷¹ See *RESTATEMENT (SECOND) OF CONTRACTS* § 39, *infra* note 170, for a definition of counteroffer.

¹⁷² LINDA J. RUSCH & STEPHEN L. SEPINUCK, *SALES AND LEASES, A PROBLEM-SOLVING APPROACH* 43 (2009) (displaying a chart of UCC 2-207 which treats all ineffective responses to offers as falling within UCC § 2-207(3)); see also WHITE & SUMMERS, *UNIFORM COMMERCIAL CODE* §2-3 46 (6th ed. 2010) (suggesting that subsection (3) works better if the seller-offeree responds to buyer-offeror with a reject and thereafter ships the goods and the buyer accepts rather than for conduct following expressly conditional acceptances). But see 1 *HAWKLAND UCC SERIES* § 2-207:1

determined by section 2-207(3), includes the terms upon which the parties agree and the supplementary gap-fillers. A counteroffer, a seasonable response that varies a dickered-for or bargained-for term of the offer, does not satisfy the condition precedent for the application of Section 2-207(1); it is not a definite and seasonable expression of assent.¹⁷³ Effect must be given to the intent of the offeree who is rejecting the offer and proposing an entirely different agreement by recognizing that a contract is being created on the offeree's terms. Moreover, an offeree's counteroffer is distinguishable from a communication that is a conditional acceptance, one that assents to the dickered or bargained for terms and demands assent to additional terms or non-dickered for different terms.¹⁷⁴ The offeree who assents to the bargained-for terms, insisting on assent to its non-dickered for terms, should be allocated the risk of contract formation on the dickered-for terms assented to if he/she failed to wait for the assent he/she insisted upon and proceeds with performance without receiving the assent he/she required.¹⁷⁵ A communication that does not assent to the

("Section 2-207 was designed to address this situation [the operation of the last shot rule when parties did not review the contents of the other's form beyond the dickered-for terms] by providing a mechanism for finding contract formation when the *acceptance* contained different or additional terms from the terms in the offer, and for determining the terms of a contract formed through an offer and acceptance in this manner.") (emphasis added).

¹⁷³ U.C.C. § 2-207(1); *see also id.* § 1-107 ("Section captions are part of the Uniform Commercial Code."). The caption for UCC § 2-207 reads as follows: "§ 2-207. Additional Terms in Acceptance or Confirmation." *Id.* at § 2-207. By its terms, UCC § 2-207 is inapplicable to counteroffers. Section 2-207(3) isn't needed to determine the terms of the contract if the counteroffer is accepted by conduct.

¹⁷⁴ *See generally*, Dorton v. Collins & Aikman Corp, 453 F.2d 1161, 1166 (6th Cir. 1972) (explaining the operation of U.C.C. § 2-207 and stating "no contract is recognized under Subsection 2-207(1)—either because no definite expression of acceptance exists or, more specifically, because the offeree's acceptance is expressly conditioned on the offeror's assent to the additional or different terms—the entire transaction aborts at this point"); C. Itoh & Co. (America) Inc. v. Jordan Int'l Co., 552 F.2d 1228 (7th Cir. 1977) ("[W]hile a seller may take advantage of an 'expressly conditional' clause . . . when he elects not to perform, he must accept the potential risk under Subsection (3) of not getting his additional terms when he elects to proceed with performance without first obtaining the buyer's assent to those terms. Since the seller injected ambiguity into the transaction by inserting the 'expressly conditional' clause in his form, he, and not the buyer, should bear the consequence of that ambiguity under Subsection (3).").

¹⁷⁵ C. Itoh & Co. (America) Inc. v. Jordan Int'l Co., 552 F.2d 1228 (7th Cir. 1977) (stating that an offeree who creates an ambiguity by insisting on assent but then performs

bargained-for terms is not a “purported acceptance” and should not trigger the application of Section 2-207. In this instance, Section 2-204 rather than Section 2-207 should govern the agreement between the parties.¹⁷⁶ Neither the legislative history nor the commentary suggests that the drafters intended to negate the viability of counteroffers with the promulgation and codification of Section 2-207.¹⁷⁷ Some might argue that the introductory language of comment 7 to 2-207 supports the position espoused by contemporary scholars who apply subsection 2-207(3) to counteroffers. This language states:

In *many cases*, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. In such cases, where the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. See Section 2-204. The only question is what terms are included in the contract, and subsection (3) furnishes the governing rule.¹⁷⁸

This commentary addresses fully executed contracts and directs that for these fully executed contracts, Section 2-207(3) is the operative rule when the writings of the parties do not establish a contract. It is, however, commentary to Section 2-207 that abrogates the mirror image rule of general contract law in two envisioned contexts: confirmation(s) of prior agreement and offer and acceptance when the acceptance “adds further *minor* suggestions or proposals”¹⁷⁹ as additional or different terms. Neither the Section nor the comments are directed towards the abrogation of counteroffers as a juridical tool in the context of goods.¹⁸⁰

without receiving it should bear the risk of contract formation under subsection (3) without obtaining its additional terms).

¹⁷⁶ U.C.C. § 2-204(1).

¹⁷⁷ Report of the New York Law Revision Commission for 1954, Hearings on the Uniform Commercial Code, vol. 1 (1954); *see, e.g.*, U.C.C. § 2-206(1)(b)(offer of an accommodation).

¹⁷⁸ U.C.C. § 2-207 cmt. 7 (emphasis added).

¹⁷⁹ *See id.* cmt. 1.

¹⁸⁰ *See* Gregory M. Travaglio, *Clearing the Air After the Battle: Reconciling Fairness and Efficiency in a Formal Approach to U.C.C. Section 2-207*, 33 Case W. Res.

Some commentators likewise assert that Section 2-207(3) should govern if the offeree's response is a nonacceptance such as "I reject your offer" but follows by shipping the goods.¹⁸¹ Applying Section 2-207(3) is problematic here as well. Offeree's rejection terminates the power of acceptance created by the offeror's offer.¹⁸² Termination of the power of acceptance minimizes the risk of potential reliance by the offeror in preparing to perform or by creating a duplicative power of acceptance in another party.¹⁸³ Likewise, the offeree is protected; his subsequent conduct cannot be interpreted as an acceptance.¹⁸⁴ The subsequent formation of a contract by the shipment of goods and acceptance by the offeror fits precisely within the parameters of Section 2-204, as Section 2-207(c) recognizes. Applying the process dictated by Section 2-207(c) results in a meaningless step: comparing the writings of the parties, the offer and the rejection to determine terms upon which the writings agree. No agreement in terms exists with these writings; the parties have only demonstrated an intent to contract by their conduct and the shipped goods provide a reasonably certain basis for a remedy.¹⁸⁵ The supplementary terms of Article 2 will be used to fill the gaps. Invoking the unwelcomed presence of Section 2-207 is unnecessary. But observe, the erroneous application of Section 2-207, here, does not result in the deprivation that the counterofferor experiences if Section 2-207(c) is applied in the counteroffer setting.

L. Rev. 327, 337-338 (1982-1983) (relying on the operation of UCC § 2-206 to illustrate that the drafters did not intend to abrogate counteroffers).

¹⁸¹ WHITE & SUMMERS, *UNIFORM COMMERCIAL CODE* §2-3 46 (6th ed. 2010); John E. Murray, *The Chaos of the Battle Of the Forms: Solutions*, 39 VAND. L. REV. 1307, 1332 (1986).

¹⁸² RESTATEMENT (SECOND) OF CONTRACTS § 38(1) An offeree's power of acceptance is terminated by his rejection of the offer, unless the offeror has manifested a contrary intention. (2) A manifestation of intention not to accept an offer is a rejection unless the offeree manifests an intention to take it under further advisement.

¹⁸³ *Id.* cmt. a.

¹⁸⁴ *Id.*

¹⁸⁵ U.C.C. § 2-204(3).

2. Battle of the Forms – The CISG

The theoretical construct of the provision of the CISG that governs a battle of the forms is diametrically opposed to that of the UCC. Discussion and debate on March 18, 1980, during the 1980 Vienna Diplomatic Conference on former Article 17,¹⁸⁶ now Article 19, establishes that the framework of Article 19 was designed to achieve a balance between two competing goals: (1) certainty and security in contract formation¹⁸⁷ and, (2) recognition of prevailing trade practice that although *minor* changes are made to the offer, the parties believe that a contract has been formed and perform it.¹⁸⁸ The governing principle of the approach adopted by

¹⁸⁶ 1978 Draft of Article 17 which became current Article 19: (1) A reply to an offer which purports to be an acceptance containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer. (2) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without undue delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. (3) Additional or different terms relating, *inter alia*, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially, unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror. *The Draft Convention on Contracts for the International Sale of Goods (1978)*, 27 AM. J. COMP. L. 325, 328-29 (1989).

¹⁸⁷ 1980 Vienna Diplomatic Conference, Summary of First Meeting Proceedings, March 18, 1980 ("25. Mr. STALEV (Bulgaria), introducing his delegation's amendment (A/CONF.97/C.1/L.91), explained that article 16(1) [became CISG article 18(1)] and article 17(1) [became CISG article 19(1)] established a fundamental rule and a rational principle, i.e., that there could be no contract without agreement by the parties on all points. However, that fundamental rule was almost nullified by the exceptions given in paragraphs 2 and 3: paragraph 2 gave an exception to paragraph 1, the first sentence of paragraph 3 an exception to paragraph 2, and the second sentence of paragraph 3 an exception to the first sentence, the result being that a contract could be concluded implicitly [sic] when there had been no agreement on the essential elements of sale as stated in the first sentence of paragraph 3. That solution sacrificed the fundamental considerations of international trade relations -- certainty and security -- to less important considerations, such as the flexibility of rules and equity in individual cases. It also jeopardized the interests of less experienced enterprises, which might not refuse an offer in good time. 26. His delegation therefore proposed that paragraphs 2 and 3 should be deleted and, if that proposal were not accepted, recommended that at least the last part of paragraph 3 from 'unless the offeree . . . ' should be deleted.").

¹⁸⁸ *Id.* ("28. Mr. SEVÓN (Finland) said that he could not agree to either of the proposals, since trade nowadays largely took place in the manner described in paragraphs

the CISG is based on the general theory reflecting the "mirror image" rule. A reply to an offer that is a "purported" acceptance but contains additional or different terms is a rejection and a counteroffer.¹⁸⁹ This principle is consistent with the general rule of domestic common law. The CISG does, however, modify the strict common law approach to counteroffers. Generally, at common law, counteroffers terminate an offer and, unless the counteroffer is accepted, no contract results.¹⁹⁰ The CISG recognizes one exception to this general rule: if the additional or different terms in the purported acceptance are *immaterial* and the offeror does not object without delay, a contract is formed based on the offer as modified or supplemented by the *immaterial* additional or different terms of the acceptance.¹⁹¹ The

2 and 3. 29. Mr. MASKOW (German Democratic Republic) regretted that he could not support the United Kingdom and Bulgarian proposals since experience had shown that in trade practice minor changes were often made to the offer and that contracts were nevertheless considered as having been concluded and were performed. The only effect that the deletion of the paragraphs would have would be to make some contracts void which would nonetheless be executed, and that would cause serious difficulties. It would therefore be preferable to keep the existing text, even if it was not perfect. In any event, the problems which those provisions might give rise to were less serious than those which might arise if the provisions were deleted."). See Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW 443, 462 (1989) (discussing the Article 19 compromise between "the strict socialist view that an acceptance that deviates from the offer amounts to a rejection, and the more flexible view of Western countries that considers the contract as concluded if the acceptance contains minor additions or limitations").

¹⁸⁹ CISG, *supra* note 15, art. 19(1) ("A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications, is a rejection of the offer and constitutes a counteroffer.").

¹⁹⁰ RESTATEMENT (SECOND) OF CONTRACTS § 39:(1) ("(1) A counter-offer is an offer made by an offeree to his offeror relating to the same matter as the original offer and proposing a substituted bargain differing from that proposed by the original offer. (2) An offeree's power of acceptance is terminated by his making of a counter-offer, unless the offeror has manifested a contrary intention or unless the counter-offer manifests a contrary intention of the offeree."). See also *id.* § 36(1)(a)-(2) ("(1) An offeree's power of acceptance may be terminated by (a) rejection or counter-offer by the offeree (2) In addition, an offeree's power of acceptance is terminated by the non-occurrence of any condition of acceptance under the terms of the offer.").

¹⁹¹ CISG, *supra* note 15, art. 19(2) ("However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so

communication is an acceptance.¹⁹² Debate and discussion at the Diplomatic Conference centered on two points: (1) the retention of this exception to the general rule, that responses with additional or different terms were counteroffers and (2) the inclusion of another exception that treated as immaterial terms, those additional or different terms arising from the offeree's understanding of the offer and those additional or different terms that reflected the practices between the parties; without exception (2) above, these terms would be treated as material ones. The text of the proposed text read:

(2) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without undue delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. (3) Additional or different terms relating, *inter alia*, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially, *unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror*.

The Conference rejected this proposal and adopted a second alternative proposed by the Bulgarian delegate,¹⁹³ eliminating the second phrase of subsection (3) that expanded the definition of "immaterial" to include exceptions implied from circumstances.

The resulting provision distinguishes immaterial terms from material ones. Unlike the UCC, the CISG identifies the following categories as material in its non-exhaustive list: "terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes."¹⁹⁴ Thus, the

object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.").

¹⁹² *Id.* art. 19(2).

¹⁹³ 1980 Vienna Diplomatic Conference, *supra* note 187, ¶ 26.

¹⁹⁴ CISG, *supra* note 15, art. 19(3).

last shot rule continues to operate, to a limited extent, under the CISG.¹⁹⁵ This fact is illustrated by the following hypothetical setting:

A French buyer reviewed the catalogue of an Illinois seller, from whom the buyer had purchased equipment over a five-year period, identified a freezer/cooler unit in the catalogue with a list price of \$7,500 and called the seller's sales department. The representative discussed the buyer's need and agreed that the selected unit was an appropriate selection. The parties discussed payments. The buyer then ordered ten units for its numerous restaurants for immediate shipping. The buyer was informed that once its credit and payment history were verified the seller would respond with its acknowledgment form. Thereafter, seller sent and the buyer received the seller's acknowledgment form correctly stating the price and the items ordered by the buyer, that the equipment had been shipped, the anticipated delivery date, and a statement that the terms and conditions on the reverse side were terms of the agreement. These terms provided that: disputes were to be resolved by binding arbitration, the buyer must provide notice of any problem within twenty (20) days of receipt in order to qualify for a remedy, and that the laws of Illinois applied. The buyer did not respond.

The buyer's order was a proposal that constituted an offer,¹⁹⁶ the price and quantity were fixed at the time the order was placed.¹⁹⁷ The sharing of its credit information, the placing of its order, and the request for immediate shipment were evidence of the buyer's intent to be bound.¹⁹⁸ Article 14 directs that this

¹⁹⁵ See generally, DiMATTEO ET AL., INTERNATIONAL SALES LAW: A CRITICAL ANALYSIS OF CISG JURISPRUDENCE 70 n.124 (Cambridge University Press 2005).

¹⁹⁶ CISG, *supra* note 15, art. 14(1) ("A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price. (2) A proposal other than one addressed to one or more specific persons is to be considered merely an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.").

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

communication is an offer.¹⁹⁹ The seller's acknowledgment is a purported acceptance because it assents to the terms of price, quantity, and subject matter. However, it is also a rejection and a counteroffer. It does not operate as an acceptance. Material terms were included in the purported acceptance. These include the settlement of disputes by arbitration, the imposition of the duty to provide notice of quality problems within twenty (20) days as a condition precedent to remedial relief, and the designation of an applicable law.²⁰⁰ The goods have been shipped. Assume that upon delivery to the buyer, the buyer takes possession of the goods. That conduct, absent circumstances indicating a contrary intent,²⁰¹ such as notice that the goods are being held for the seller, should constitute acceptance of the seller's counteroffer.²⁰² The seller's counteroffer with the material additions will govern their transaction. Unlike the policy goal of the UCC to forge a contractual relationship upon assent to the bargained-for terms, the CISG treats material modifications to the offer as a counteroffer. Only with assent to the counteroffer is a contract formed.

Some might argue that the above analysis under the CISG is indistinguishable from the outcome if UCC 2-207(1) and (2) were applied to the facts. This is an erroneous conclusion produced by the similarity of the language of the two laws. If the UCC was applied to the above hypothetical situation, the sending of the purported acceptance with additional terms results in a *contract* without addressing the materiality of the terms suggested by the offeree. The parties have a *contract* and obligations of performance. The parties in the hypothetical setting are

¹⁹⁹ *Id.*

²⁰⁰ CISG, *supra* note 15, art. 19(3).

²⁰¹ *Id.* art. 8(1)–(2).

²⁰² *Id.* art. 18(1) (“A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.”) *See also* CISG, *supra* note 15, art. 18(3) (“However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.”).

merchants, professionals.²⁰³ Therefore, Section 2-207(2) requires an assessment of whether the additional terms are terms of the contract. Subsequent to contract formation, two questions must be addressed: "Did the offeror limit acceptance to the terms of the offer"; if not, "Are the terms materially altering and not part of the contract or are the terms immaterial and, therefore, part of the contract?" This is a subtle but significant difference. For example, assume in the foregoing hypothetical that the offeror objects to the additional terms under 2-207(2)(c) after receiving the purported acceptance; this objection prevents a term determined to be an immaterial term from becoming a term of the already existing contract but does not limit contract formation. However, the application of the CISG produces a different result: the purported acceptance including additional or different material terms, as defined by the law, is a counteroffer, and buyer's acceptance of the shipped goods will operate as an acceptance.²⁰⁴ If the term are immaterial ones, the buyer-offeror must object orally or by dispatching a notice of objection, ~~no~~ to prevent formation of a contract that includes the offeree's immaterial terms.

Whether the governing law is the CISG or the UCC, commercial parties are likely to believe that a contract exists after the exchange in forms, and one or both of them may perform. Only if a dispute arises will the question of formation arise. Rather than generating costly litigation or arbitration under the UCC on whether a contract exists or whether the additional terms are material or immaterial and, therefore, terms of the contract, resolution of the dispute is facilitated under CISG Article 19. The seller's communication was a counteroffer that was later accepted; the offeree's terms govern even if those terms are material because the counteroffer is the governing document.²⁰⁵ The cost of international litigation or arbitration, the difficulties in communications because of language differences, and likelihood of great physical distance between the parties support a policy goal that results in greater clarity of the governing terms rather than fostering contract formation with a later resolution of the

²⁰³ U.C.C. § 2-104.

²⁰⁴ CISG, *supra* note 15, art. 19(2).

²⁰⁵ *Id.* art. 19(1).

governing terms. From its entry into force in 1988, only 129 cases are indexed for raising an Article 19 issue. The “Uniform Commercial Code 2-207 makes a major change in the traditional approach, which has reduced the possibility of reneging in the first type of situation [change in circumstances before performance], at the cost of increasing the likelihood of disputes in the second type of situation [change in circumstances after performance such as delivery of the goods].”²⁰⁶

Despite the benefits afforded by the approach to the battle of the forms in the CISG, some courts reject the application of the limited last shot rule that the CISG imposes.²⁰⁷ Interpreting Article 19 with the goal of modernizing the CISG results in a deviation from the provisions of a promulgation that was not an attempt to replicate any existing domestic legal regime, but rather to create an autonomous one by harmonizing disparate approaches to legal problems and to increase the predictability of the risks untaken. Interpreting the CISG consistent with the goals of the UCC or German domestic law to abrogate the mirror image rule and the last shot rule depart from a court’s duty to interpret the CISG as directed by Article 7: (1) consistent with its international character rather than permitting the analysis to be driven by *local law* and policy; (2) to promote uniformity in its application - thus, mandating review of opinions of courts and arbitral awards emanating from other contracting states; and (3) to encourage the

²⁰⁶ E. Allan Farnsworth, *Formation of Contract*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 3-15 § 3.04 (Matthew Bender 1984), available at <http://www.cisg.law.pace.edu/cisg/biblio/farnsworth1.html> (last visited Mar. 31, 2014).

²⁰⁷ See, e.g., Oberster Gerichtshof [OGH] [Supreme Court] Mar. 20, 1997, docket no 2 Ob 58/97m, Clout no. 189 (Austria) (stating that a buyer’s change in its acceptance enlarging quantity is a nonmaterial change if it benefits the seller); Amtsgericht [AG] [Petty District Court] Oct. 6, 1995, Kehl 3 C 925/93 (Ger.) (available at <http://cisgw3.law.pace.edu/cases/951006g1.html>) (Gerd A. Zimmermann trans., Ruth M. Janal ed.) (assuming seller sent its general conditions parties waived the differences and a contract was formed); *Filanto S.p.A. v. Chilewich International Corp.*, 789 F.Supp. 1229 (S.D.N.Y. 1992) (available at <http://www.cisg.law.pace.edu/cases/920414u1.html>); see Larry A. DiMatteo, et. al., *The Interpretive Turn In International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT’L L. & BUS. 299, 352-55 (2004) (reviewing the various approaches employed by courts to avoid the effect of Article 19).

observance of good faith in international trade.²⁰⁸ Most importantly, the court's interpretation will defeat the expectations of the nations who are contracting states to the CISG.

Unlike UCC Section 2-207 that has spawned substantial litigation for determining the operation of the Section and resulting terms of a contract, retention of a modified mirror image rule and the last shot rule in Article 19 minimizes costly cross-border litigation and fosters resolution of disputes because of the operation of the last shot rule. The last shot rule, although conservative, provides predictable results.²⁰⁹

VI. Conclusion

The principles of contract formation of the CISG and the UCC, supplemented by the common law, vary substantially. The Model Rules of Professional Conduct mandate that an attorney must be competent in her representation of her clients.²¹⁰ Attorneys are obligated to ascertain the differences between the two regimes and to determine the impact of the competing approaches on the client's business objectives and contract goals before encouraging the client to opt out of the CISG when it is applicable.²¹¹ Given the impact of geographical distances, language differences, and the cost of dispute resolution in cross border transactions, the conservative "last shot rule" of the CISG provides greater certainty for determining the terms of the contract than UCC § 2-207. In contrast, the risk of an allegation of a contrary "actual intent," coupled with the speed and frequency of electronic transacting in a global community inundated with information, opting out of Article 8(1) and adopting Article 8(2) as the governing standard for interpreting both the intent of the parties and the meaning of

²⁰⁸ CISG, *supra* note 15, art. 7.

²⁰⁹ E. Allan Farnsworth, *supra* note 206, 3-16 § 3.04.

²¹⁰ MODEL RULES OF PROF'L CONDUCT, R. 1.1 (1983) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). For a list of states that adopted the Model Rules of Professional Conduct, see http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/chrono_list_state_adopting_model_rules.html.

²¹¹ See CISG, *supra* note 15, art. 6 (permitting the parties to derogate from any or all of the provisions).

terms is a reasonable recommendation to contracting parties. This type of analysis should be undertaken by counsel when addressing contracts for the international sale of goods in fulfilling their ethical obligation to serve as a competent advisor.